

## Summary of Public Comment

ESE received only 2 sets of comments after posting the Emergency Regulations on Criminal History Checks for School Employees – one set from the Boston Public Schools (BPS) and another from the Massachusetts Teachers’ Association (MTA). Both sets of comments are attached. BPS’s comments were predominantly a series of questions about the implementation of the requirements. The Department, along with the Executive Office of Education, and Executive Office of Public Safety and Security Agencies are preparing a series of documents which will provide necessary information to the field. The MTA suggested a number of substantive changes to the emergency regulations, some of which have been incorporated in the proposed amendments and others which were rejected. The significant substantive suggestions made by the MTA and the Department’s responses are summarized below.

- **41.02 Definitions**

Conditional employee: MTA sought to clarify this definition by adding the phrase “the employer’s” in one place and adding a sentence at the end of the definition to establish that the definition only applied in the context of the regulations.

ESE response: Added the phrase “the employer’s” for clarity, but did not add sentence, which was unnecessary and would have made the definition confusing.

- **51.04 School Employer Policies on National Criminal History Checks and Suitability Determinations; Confidentiality; Dissemination; Audit.**

51.04(3)(a) MTA suggested additional language to provide notice of other statutes that might give employees rights.

ESE response: The proposed language was adopted in part, so the section now reads:

- (a) comply with applicable federal and state laws and regulations, which may include, but are not limited to, M.G.L. c. 71, §§ 42 and 42D, and c. 150E, if applicable;

51.04(4) MTA suggested language that would make clear that national criminal history checks must be transmitted in a confidential and secure manner and must be provided to the employee upon request. The proposed language would reiterate requirements spelled out in CORI regulations and would require an employer to provide a copy of the national criminal history check results to an employee or applicant before destroying the records, even if the employee or applicant never requested the results.

ESE response: The proposed revisions add language requiring the records be transmitted in a confidential and secure manner and be provided to the employee upon request. The revisions did not adopt the suggestion that the requirements from the CORI regulations be spelled out in these regulations, as this information is available in the CORI

regulations and will be provided in guidance documents made available to employers and applicants. ESE also rejected the suggestion that all employers be required to provide a copy of the national criminal history check results to any employee or applicant before the results are destroyed according to a destruction schedule. This would be an unnecessary burden on employers, who are required to make the results available upon request.

▪ **51.05 Timing of National Criminal History Checks**

51.04(4)(b) MTA suggested language to make clear that as with regular employment, before hiring a conditional employee, the employer should first run a CORI check and make sure nothing in the CORI check precludes employment and the employer can rely on a previous suitability determination. MTA also suggested language making clear that employers can ask individuals to provide additional information regarding their history of criminal convictions only until the results of the national criminal background check are received.

ESE Response: The proposed amendments adopt the MTA's suggestions regarding employer's first running CORI checks and employer's ability to rely on previous suitability determinations. ESE adapted the MTA's proposed language regarding asking an individual about previous criminal history to provide that an employer may do so until the employer has made a suitability determination or the results of a previous suitability determination have been received.

▪ **51.06 Employer Documentation of Suitability Determination; Reliance Thereon; Subsequent Checks.**

51.06(3) MTA suggested:

- extending the period during which a previous suitability determination may be relied to 10 years, from 7 in the emergency regulations;
- extending the period during which an individual may live outside Massachusetts without rendering a previous suitability determination invalid for reliance by a subsequent employer from 3 months to 5 years;
- extending the period of acceptable gaps in employment from 2 years to 5 years before a suitability determination may not be relied upon;
- changing language to that time on a leave from work, but while still employed by the same employer shall not count as a gap in employment (e.g. a maternity leave)

ESE response: The ESE rejected all of the suggested extensions of the validity periods for suitability determinations as inconsistent with the purpose of the law – that is that school employers are informed of any out-of-state criminal convictions for prospective personnel when making hiring decisions. The periods in the proposed regulations allow for a subsequent employer to rely on a previous suitability determination, if made relatively recently, and if the individual has been fairly consistently employed by a Massachusetts school employer in the interim, and if the individual has primarily lived in

Massachusetts – where any criminal arrests or convictions would show up in a mandatory CORI check. The MTA’s suggestions would allow someone who spent the last five years living out-of-state and completely out of the education field to rely on a 10 year old suitability determination.

The ESE accepted the MTA’s suggestion that the language regarding gaps in employment be amended so that periods during which an individual is employed by a school employer, but on an approved leave, will not count as a gap in employment.

51.06(5) The MTA suggested language that would allow an individual to present a copy of his or her own criminal background check report to an employer, and for the employer to rely on that report rather than having a new criminal background check run.

ESE response: ESE rejected this suggestion as inconsistent with FBI requirements.

- **51.07 Reporting National Criminal History Check Results to the Commissioner.**

51.07(1) and (2) The MTA suggested that language be added to these reporting requirements requiring an employer who is reporting information to the Commissioner regarding a license holder or applicant simultaneously send copies of the report and the national criminal history report and any other correspondence to the applicant or employee.

ESE Response: ESE proposed amendments to the regulations to require a school employer to notify an individual when a report was being made to the Commissioner regarding the results of a national criminal background check. The employer would have already provided the report to the individual if taking an adverse action based on the report.